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In The

Supreme Court of the United States

October Term, 1998

MT. HOPE ASPHALT CORP. a/k/a MOUNT HOPE ASPHALT CORP. and BARBARA PETROSKY, as Executrix of the Estate of Frank Petrosky,

Petitioners,

vs.

MICHAEL ZAGATA, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

REPLY BRIEF FOR PETITIONERS

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PRELIMINARY STATEMENT

Petitioners, Mt. Hope Asphalt Corp. and Frank Petrosky, submit this Reply Brief solely to correct the misstatements and misapprehensions which the Respondent, State of New York, has created in its brief in opposition to the Petition for Writ of Certiorari. Regrettably, instead of addressing what Mt. Hope asserts are serious and compelling constitutional questions as to the State's alleged violations of the Interstate Commerce Clause and the Equal Protection Clause of the United States Constitution (as to which the State's Brief contains but a two-paragraph response), the apparent thrust of the State's Brief is to assassinate the character of Mt. Hope by alleging that it falsified records, concealed information and demonstrated unsuitability to conduct its recycling activities. While these charges were in fact litigated before the Administrative Law Judge in a two-week trial, the record speaks for itself: the ALJ concluded that Mt. Hope had caused no harm to the environment; had maintained logs accurately reflecting the sources of out-of-state petroleum-contaminated soil (PCS); had made no attempt to conceal these out-of-state shipments from State inspectors; and had seen to it that all out-of-state shipments of PCS satisfied all of the governmental Quality Assurance/ Quality Control requirements of Mt. Hope's permit.

The State's misdirected emphasis upon Mt. Hope's alleged wrongdoing, and lack of attention to Mt. Hope's constitutional issues, combine to illustrate the weakness of the State's legal position on this Petition. It is respectfully urged that the Petition be granted and that Mt. Hope be afforded the opportunity to brief fully the Supreme Court on its significant constitutional claims.

In this Reply Brief, Mt. Hope will first reply to Respondent's erroneous counter-statement of the case, and then reply to the State's specious legal argument.

REPLY TO COUNTER-STATEMENT OF THE CASE

The most egregious misstatement by the State of New York is that Mt. Hope included in its application a "self-imposed condition" by which it restricted itself to accepting only New York PCS, *i.e.*, soil which could be identified by a spill number. Brief in Opp'n at 3. The New York State Department of Environmental Conservation ("NYSDEC") claims that this condition was proposed by Mt. Hope in order to assure NYSDEC that the petroleum contaminated soil used in Mt. Hope's asphalt production process "was contaminated only with virgin petroleum and no other contaminants." *Id.* Thus, claims the State, Mt. Hope "waived" any constitutional claim it might otherwise have had.

NYSDEC misstates the facts. In spite of the statement that such a "self-imposed condition" appeared in Mt. Hope's application, Mt. Hope never proposed such restriction. NYSDEC's reference to the so-called "self-imposed condition" language is presented out of context, and appeared not in Mt. Hope's application, but in an engineering report prepared by Disposal Technologies and Impact Environmental submitted during the application process. The engineering report's overview included the following statement erroneously attributed to Mt. Hope and erroneously referenced as a restriction against all but in-state PCS:

> Disposal at the Mt. Hope facility will enable the New York Department of Environmental Conservation to fully regulate all aspects of material transport and disposal. What enables the DEC to have this control is an elaborate, *self imposed* sampling, analysis, transport and reporting protocol. This protocol provides a long series of checks and balances on management activities which can be

> easily and accurately monitored by the DEC on a continuous basis.

(A243, cited at Brief in Opp'n at 3 (emphasis added).)

A close reading of the subject engineering report reveals that Mt. Hope's "*self-imposed sampling, analysis, transport and reporting protocol*" did not include any restriction or representation that Mt. Hope would utilize only PCS originating in New York. The engineering report does, however, provide that pre-qualification procedures including detailed sampling and analysis would ensure that all materials would be non-hazardous within the meaning of the Resource Conservation and Recovery Act. (A255.) Nowhere does the State claim that Mt. Hope violated this requirement.

Similarly, as set forth fully in Mt. Hope's brief to the New York Supreme Court's Appellate Division, NYDEC's representation that assignment of spill numbers was a critical safety element of the manufacturing process is totally unsupported by the record. The record, in fact, is abundantly clear that no safety function was ever served by the spill number, and no deception or environmental harm resulted from the use of PCS which did not have a New York spill number.[1]

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1. NYSDEC's compliance officer testified that he did not know whether a spill number in any way indicated whether the spill involved hazardous or a non-hazardous material; that spill numbers were issued simply on the basis of a telephone call rather than an inspection (AT 1526-1527); and that the source of origin of the PCS — whether from New York or any other state — was irrelevant as far as air omissions were concerned. (AT 1528-1529.)

Testimony further dispelling the myth of the spill number's significance came from another NYSDEC witness, Richard Parish, who testified that while a spill number could be used to identify the location

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The record also reveals that NYSDEC knew that Mt. Hope was processing out-of-state PCS because, in compliance with its EP2 permit, Mt. Hope's log books contained entries indicating that Mt. Hope received and processed PCS from New Jersey. (A650.) The record is clear that these log books, as well as individual reports for each shipment of soil received by Mt. Hope, were on file at Mt. Hope's offices at all times, where they could be reviewed and where, in fact, they were reviewed on numerous occasions by NYSDEC inspectors. (T 124, ln. 3-5 - T125 ln. 12; T 141, lns. 20-24; T 354 ln. 23 - T 355 ln. 25; T 362, ln. 21 - T 363 ln. 5; A 125.) Upon review of the same logs, Judge Weber of Suffolk County Court held that charges against Mt. Hope were unfounded and noted that "any reasonable and literate examiner of the documents could not have been deceived. . . ." *People v. Mt. Hope*, 167 Misc. 2d 517 (Suff. Cty. Ct. 1995).

Thus, in spite of the State's erroneous representations that Mt. Hope's application contained a self-imposed restriction to in-state PCS, and that it "falsified records, failed to disclose the source of its production materials and demonstrated unsuitability to conduct the activities authorized under the permit" (Brief in Opp'n at 6), the record says otherwise. The record establishes that Mt. Hope never represented or understood that such a restriction applied; that it did not violate its permit; and that the DEC was never deceived. It knew and approved, or certainly acquiesced, in Mt. Hope's processing of New Jersey PCS, and with good reason: there was no sound environmental reason not to do so.

(Cont'd)
of a spill, Mt. Hope's pre-qualification chemical analysis determined whether soil could properly be brought into the facility. (AT 2373-2376.) In point of fact, Mr. Parish conceded on the record that New Jersey had more stringent controls than New York and that Mt. Hope had never proposed that it be restricted to receiving soil only from the State of New York. (AT 2377-2378.)

For all of these reasons, New York's contention — that Mt. Hope agreed to a self-imposed condition limiting its process to New York PCS — is contrary to the record this case and cannot constitute, as speciously proffered by the State, an "intentional relinquishment of a known right or privilege" under *Faretta v. California*, 422 U.S. 806, 835 (1975). As a result, Mt. Hope's constitutional claims must be addressed, and if addressed by this Court, should result in a reversal of the lower courts herein.

I.

MT. HOPE'S COMMERCE CLAUSE AND EQUAL PROTECTION ISSUES WARRANT THE ATTENTION OF THIS COURT.

In Mt. Hope's Petition for Writ of Certiorari, it has compellingly stated its Commerce Clause and Equal Protection arguments which warrant being addressed by the nation's highest court. Those arguments will not be repeated here. What is startling, however, is the short shrift which the State of New York gives to these significant issues — issues which it would like the Court to conclude either pose a "relatively small, incidental burden on interstate commerce" or are non-existent (because all recyclers of PCS have allegedly been treated the same). Nothing could be further from the truth.

A. The Commerce Clause Violation

New York has conceded that its restriction on Mt. Hope's ability to use out-of-state PCS constitutes a burden on interstate commerce (Brief in Opp'n at 7). The only question left, then, it whether such a burden is, as contended by the State, a "relatively small, incidental" one, or whether it is of such significance as to warrant intervention by this Court. Let it be clear that it is of great significance to Mt. Hope, which has been shut down as a

result of these violations of its constitutional rights. It should be of like significance to this Court, as well, because to allow this prohibition to stand will signal to the States that they can with relative impunity burden interstate commerce in this manner. This has nothing to do with a State regulating matters of "legitimate local concern" (*Maine v. Taylor*, 477 U.S. 131, 138 (1985)), and the burden is "clearly excessive in relation to the putative local benefits" (as to which there are none). *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Most pointedly, at the conclusion of its one-paragraph argument on the Commerce Clause issue, the State asserts:

> Significantly, there is nothing in the record to suggest even remotely that NYDEC would have been indisposed to adopt any alternative effective method of assuring PCS quality.

(Brief in Opp'n at 8).

The record is replete with proof that the PCS from New Jersey was in all respects of like quality to that from New York; that New Jersey had more stringent standards for QA/QC; that the PCS was only contaminated, as it should have been, with virgin petroleum product; and that Mt. Hope caused no environmental harm whatsoever by its recycling and processing of New Jersey PCS. New York State was never disposed to *any* alternative method of assuring PCS quality. It claims to have barred New Jersey PCS; it has put Mt. Hope out of business because it recycled New Jersey PCS; and this violation of Mt. Hope's constitutional rights under the Interstate Commerce Clause and the Equal Protection Clause should be recognized by this Court.

B. The Equal Protection Violation

Even more startling is the two-sentence argument which the State of New York makes in opposition to Mt. Hope's

claimed violation of the Equal Protection Clause (Brief in Opp'n at 8). The gist of New York's argument, without support or authority, appears to be that it treated Mt. Hope similarly to all other asphalt recyclers, this despite the acknowledgment that it allowed at least one of Mt. Hope's competitors to recycle New Jersey PCS. It is respectfully submitted that New York has acknowledged Mt. Hope's *prima facie* case regarding the violation of its equal protection rights, which violation cries out for redress from this Court.

CONCLUSION

As is clear from its Brief in Opposition to Mt. Hope's Petition, the Respondent State of New York has taken the untenable position that if it does not like a particular permittee, it can trample upon its constitutional rights with impunity, and hide these transgressions behind unfounded charges of character unfitness. After twenty-five years of operation without incident, Mt. Hope has now been shut down for over five years, a situation which begs for the attention of this Court.

For all of the above reasons, it is respectfully requested that Mt. Hope's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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